IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 21ST JUNE 2007 / 31ST JYAISHTA 1929

SA.No. 69 of 1994(G) AND CROSS OBJECTION

AS.88/1988 of SUB COURT,PARAVUR
OS.118/1985 of MUNSIFF COURT, PARAVUR

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LEGAL REPRESENTATIVES OF 1ST DEFENDANT/
LEGAL REPRESENTATIVES OF 1ST RESPONDENT IN A.S./
APPELLANTS:

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1. **MARIYAKUTTY, W/O. VAREEDKUTTY, THEKKINEDATH, KOONAMAVU P.O.**

2. **POULI, W/O.BABU, MANAVALAN, VALIYAKADAMAKUDY, KADAMAKUDY P.O.**

3. **JOSEPH, S/O.VAREEDKUTTY, THEKKINEDATH, KOONAMAVU P.O.**

4. **THOMAS, S/O.VAREEDKUTTY, THEKKINEDATH (JOBY COMPLEX), VALPPARAI P.O., VIA.POLLACHI.**

5. **MARY, W/O.AUGUSTHYKUTTY, PARAMBATHUSSERRY, NEERIKODE P.O.**

6. **ANTONY, S/O. VAREEDKUTTY, THEKKINEDATH, KOONAMMAVU P.O.**

7. **PHILOMINA, W/O.MATHEW, ELAVITHUNKAL, PARAKADAVU P.O.**

8. **ANIE, D/O.VAREEDKUTTY, THEKKINEDATH, KOONAMMAVU (MENTALLY RETRARED REPRESENTED BY NEXT FRIEND-BROTHER ANTONY)**

...2/-

9. JAMES, S/O.VAREEDKUTTY,
THEKKINEDATH (NEAR ST.SEBASTIAN CHURCH),
VALPPARA P.O., VIA. POLLACHI.

BY ADV. SRI.V.SIVASWAMY
SRI.V.V.ASOKAN
SRI.K.I.MAYANKUTTY MATHER

PLAINTIFF & 2ND DEFENDANT/APPELLANT AND 2ND RESPONDENT/ RESPONDENTS:
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1. DEVASSY PAPPU, MANJALI VEETTIL,
ALANGADU PAKUTHY, THIRUVALLOOR KARA.

2. ELIZABATH, W/O.JOSEPH,
THEKKINEDATHU KOTTUVALLY PAKUTHY,
VALLUVALLY MURI.

BY ADV. SMT..K.AMBIKA)for R1
SRI.B.JAYASANKAR)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 21/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.150/1994 IN S.A.NO.105/1994

DISMISSED

21/06/2007 **SD/-M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO.69 OF 1994

Dated 21st June 2007

J U D G M E N T

Legal heirs of first defendant in O.S.118 of 1985 on the file of Munsiff court, Parur are appellants. Respondents are respectively plaintiff and second defendant. Plaint schedule property is 56.67 cents in Thiruvallur village which is the part of 85 cents in survey No.298/3. Admittedly, entire property originally belonged to Mariyam and on her death there was partition between the legal heirs and property was purchased by Govindan Karthavu from the sharers to whom it was allotted under Ext.A2 assignment deed. Under Ext.A3 assignment deed deceased first defendant admittedly purchased that property. It is also not disputed that first respondent was a varam tenant in respect of portion of the property. First respondent filed a petition before Land Tribunal for purchase of jenm right of the lease hold property. It was allowed. First defendant challenged that order before Appellate Authority, Land Reforms in L.R.A.S.518 of

1975. When that appeal was pending, dispute between tenant and landlord were settled and a J form was submitted before Appellate Authority and acting on it. First respondent was granted a purchase certificate in respect of 56.667 cents. Out of the remaining property first respondent sold 35 cents under Ext.B1 sale deed in favour of one Elizabeth. Thereafter alleging that first respondent trespassed and reduced a portion of the remaining property in the possession of deceased defendant, he instituted O.S.301 of 1982 before Munsiff court, North Parur seeking a decree for recovery of possession. First respondent in that suit disputed the description of plaint schedule property as well as the right and title of deceased defendant to the property claimed. Rejecting the defence taken by first respondent, under Ext.A4 decree (Ext.B4 judgment) recovery of possession was granted in favour of deceased defendant. When appellant sought execution of the decree, first respondent resisted delivery of the property, contending that decree schedule property which was sought to be taken delivery of was not identified. That objection was overruled by the executing court. It is thereafter O.S.118 of 1985 was filed by first respondent. Decree sought for was a declaration of title of first respondent

to the plaint schedule property and further declaration that in execution of the decree in O.S.301 of 1982 deceased defendant is not entitled to take possession of the plaint schedule property and consequential decree for permanent prohibitory injunction. Case of first respondent in the plaint was that plaint schedule property is 56.667 cents which was covered by the J form pursuant to which purchase certificate was granted to first respondent from the Land Tribunal and O.S.301 of 1982 was decreed on the evidence of first respondent that he is prepared to measure and give the property belonging to appellant excluding the property belonging to first respondent as per the purchase certificate J form. It was contended that excluding the property covered under Ext.B1, appellant is not entitled to any property and therefore a decree is to be granted. Defendant resisted the suit contending that first respondent is not entitled to challenge Ext.A4 decree which is valid and binding on him and description of the property is not correct and attempt of first respondent is to deny the fruits of Ext.A4 decree obtained in O.S.301 of 1982. Learned Munsiff on the evidence of Exts.A1 to A6 and B1 to B4 dismissed the suit holding that first respondent is not entitled to challenge Ext.A4

decree, which is valid and binding on him and first respondent did not establish the identity of the plaint schedule property. First respondent challenged the decree and judgment before Sub court in A.S.88 of 1988. First appellate court on re-appreciation of evidence found that first respondent has title to the property covered under the J form and therefore held that first respondent has title to the plaint schedule property. But finding that Ext.A4 decree has become final and is binding on first respondent. First appellate court held that he is not entitled to get a decree for injunction. But decree for declaration of his title to plaint schedule property was granted. It is challenged in the second appeal. Second appeal was admitted formulating the following substantial questions of law.

> 1) Whether on the facts stated in the plaint, suit is not barred under Section 47 of Code of Civil Procedure.
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> 2) Having found that Ext.A4 decree has become final and is binding on first respondent, was the first appellate court justified in granting a decree in favour of first respondent.

2. Learned counsel appearing for appellants was heard. There was no representation for respondents.

3. Appellants cannot dispute the right of first respondent over 56.667 cents covered under the J form filed before Appellate Authority, Land Reforms in L.R.A.S.518 of 1975 pursuant to which a purchase certificate was issued. Appellant also cannot dispute that out of the property obtained by him under Ext.A1, 56.667 cents covered under the J form filed before Appellate Authority is not available with him and out of the remaining 35 cents property covered under Ext.B1 was also alienated. After the said alienation appellant filed O.S.301 of 1982 before Munsiff court, Parur and obtained Ext.A4 decree for recovery of possession of 28.319 cents in survey No.298/3. Ext.A4 shows that the property covered under the decree is 28.319 cents which lies to the west and north of the property of Kanjirathinkal Raman and to east of the property of Kochuvarkey and to the north of 'Edavazhi'. Though first respondent contended that Ext.A4 decree schedule property was not identified, Ext.B4 judgment in O.S.301 of 1982 shows that issue No.1 therein was whether plaint schedule property is correctly described. Court found that description of the property is correct. On that finding a a decree for recovery of possession on the strength of title was granted.

Therefore, first respondent is not entitled to contend that Ext.A4 decree schedule property is not identifiable or that it is the property covered under J form filed before Appellate Authority or the purchase certificate obtained by him to the J form.

4. Unfortunately, first appellate court did not appreciate the facts in the proper perspective. Trial court rightly appreciated the facts and found that as Ext.A4 decree is valid and binding on first respondent, he is not entitled to dispute the right of appellant to execute the decree or to take delivery of that property and he cannot claim any right or title to the said property. First appellate court was carried away by the fact that by the J form appellant admitted that first respondent is a tenant of 56.667 cents which is the extent of the property in the plaint and granted a decree for declaration of title. But the crucial question as to the identity of 56.667 cents covered under J form, filed before the Appellate Authority was not considered at all. In fact, no material was placed before the courts below to enable the courts to fix the said property. Therefore, without identifying the property covered under J form and that too excluding the property covered under Ext.A4 decree, first respondent is not entitled to get a decree

for declaration of his title. The attempt of the first respondent was evidently to get a decree for declaration of his title over the plaint schedule property, contending that it is the property covered under the J form and purchase certificate issued to him pursuant to J form and therefore Ext.A4 decree cannot be executed in respect of that property. Attempt was to get a decree from the court without producing the records relating to the J form or the purchase certificate. First Appellate court unfortunately fallen on that trap and granted a decree, though a decree for injunction against execution of Ext.A4 decree was not granted. Virtually, a decree for declaration was granted which is ineffective as first appellate court permitted appellant to take delivery of the property covered under Ext.A4. When identify of plaint schedule property in O.S.304 of 1982 was the subject of dispute and was settled, as is clear from Ext.B4 executing court rightly did not allow first respondent to raise that contention in the execution stage. It is thereafter suit was filed to get a decree in disguise. As rightly pointed out by learned counsel appearing for appellants, first respondent is not entitled to challenge Ext.A4 decree. Even with regard to the identity as it is barred under Section 47 of Code of

Civil Procedure and all questions arising between the parties to the decree relating to the execution shall be determined only by the court executing the decree and not by a separate suit. First respondent did not establish that plaint schedule property is the property covered under the purchase certificate obtained from Land Tribunal and that too pursuant to the J form filed before the Land Tribunal and is not the property covered under Ext.A4 decree. Hence first respondent is not entitled to get a decree for declaration of his title to the plaint schedule property. Therefore, first respondent is not entitled to the decree for declaration granted by first appellate court.

Appeal is allowed. Decree and judgment passed by first appellate court is set aside that of the trial court restored. The suit stands dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.69 OF 1994

21st JUNE 2007

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